

82-2064

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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1982

QUALITY FORD, INC., a Utah Corporation,
THOMAS REDD and VIOLET REDD,
Petitioners,

vs.

FORD MOTOR COMPANY, a Delaware Corporation,
and FORD MOTOR CREDIT COMPANY,
a Delaware Corporation, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

LOWELL V. SUMMERHAYS

EDWARD T. WELLS

Counsel of Record

W. ANDREW CLAWSON

SUMMERHAYS, RUNYAN

& MCCLELLAND

*420 Continental Bank Bldg.
Salt Lake City, Utah 84101*

QUESTIONS PRESENTED

1. Is a notice of appeal which is filed after the entry of summary judgment dismissing the petitioners' complaint against actual remaining defendants, but before the technicality of dismissing the action with a signed order as to certain defendants who actually settled with the plaintiff three years prior to the entry of the summary judgment, who were not named as defendants in the amended complaint, and who had not been involved in the proceedings for 3 years, considered a nullity or should this technicality be ignored and the appeal heard on its merits?

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In the Supreme Court of the United States

OCTOBER TERM, 1982

QUALITY FORD, INC., a Utah Corporation,
THOMAS REDD and VIOLET REDD,
Petitioners,

vs.

FORD MOTOR COMPANY, a Delaware Corporation,
and FORD MOTOR CREDIT COMPANY,
a Delaware Corporation, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Warren Burger, Chief Justice of the
Supreme Court and the Honorable Justices of the
Supreme Court of the United States.

The above-named Petitioners respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit Court entered in the above-entitled cause, dismissing the Appeal of Petitioner, Quality Ford, Inc., which was entered in said Court of Appeals in Case No. 82-1788 on December 15, 1982, and from the Order of said Court of Appeals denying Petitioners' petition for a rehearing on February 10, 1983.

OPINIONS BELOW

The opinions of the Court of Appeals are unreported at the date of the printing of this Petition, but are printed in Appendix B.

JURISDICTION

The judgment of the Court of Appeals dismissing the appeal of Petitioners was entered on December 15, 1982, and has not been reported. A petition for rehearing was denied on February 10, 1983. Jurisdiction of this Court is invoked under 18 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Is a notice of appeal which is filed after the entry of summary judgment dismissing the petitioners' complaint against actual remaining defendants, but before the technicality of dismissing the action with a signed order as to certain defendants who actually settled with the plaintiff three years prior to the entry of the summary judgment, who were not named as defendants in the amended complaint, and who had not been involved in the proceedings for 3 years, considered a nullity or should this technicality be ignored and the appeal heard on its merits?

FEDERAL RULES INVOLVED

The Federal Rules of Civil Procedure involved in this case are 28 U.S.C. Rules 1, 8 and 61.

STATEMENT OF THE CASE

On September 20, 1978, Petitioners commenced this cause of action against Ford Motor Company, (hereinafter Ford Motor) and Ford Motor Credit Company, (hereinafter Ford Credit), Russell Brambrough (hereinafter Brambrough), and Danny Van Keuren, (here-

inafter Van Keuren) alleging several violations of the Antitrust laws. At the same time, a case by the Petitioners was pending in the Third District Court for the State of Utah against Brambrough, Van Keuren and Quality Ford, Inc. arising out of the same factual situation.

In July, 1979, Petitioners Redd settled the State Court case with Brambrough, Van Keuren and Quality Ford (hereinafter Quality). As part of that settlement, the Federal action was dismissed as to Brambrough and Van Keuren. (Affidavit of John S. Adams Appendix C). A motion and order for dismissal was sent to the attorney for Brambrough and Van Keuren dismissing them from the Federal action, but for some reason Defendants' counsel never filed the dismissal order. (Appendix C.)

Subsequently, an amended complaint was filed omitting Brambrough and Van Keuren. Since July, 1979, for all intents and purposes, Brambrough and Van Keuren were treated as though they were actually dismissed, but for the technicality of an actual order of dismissal signed by the Court.

The case continued between the Petitioners and Defendants Ford Motor and Ford Credit. On June 16, 1982, Summary Judgment was granted in favor of the remaining Defendants. On June 29, 1982, Petitioners filed a Notice of Appeal. On August 18, 1982, the Clerk of the Court of Appeals for the Tenth Circuit informed Petitioners that the Court was considering summary dismissal of the case for lack of jurisdiction because no Order dismissing Brambrough and Van Keuren had been entered.

In response to the issue raised by the Court, a clerk working for the law firm representing Petitioners prepared a new Stipulation, Motion and Order dismissing Brambrough and Van Keuren and filed it with the District Court.

On September 1, 1982, the District Court Judge signed the Order of Dismissal. However, when the signed Order was received by the above-mentioned clerk, it was not shown to any attorney in the office. Consequently, a second notice of appeal was never filed. (Affidavit of W. Andrew Clawson, Appendix D.)

On December 15, 1982, the United States Court of Appeals for the Tenth Circuit dismissed the appeal based upon a hypertechnical construction of the Federal Rules of Civil Procedure holding that since Brambrough and Van Keuren had not technically been dismissed prior to the June 16, 1982 Order, the Order was not final and, therefore, the appeal from that Order could not grant jurisdiction to the Appellate Court.

REASONS FOR GRANTING THE WRIT

The most important reason for granting the Writ is that the decision of the Court of Appeals is contrary to the letter and the spirit of the Federal Rules of Civil Procedure, the Judicial Code, and the basic principles of modern federal practice and procedure articulated by this Court, and the majority of the other Circuits. The area of dispute involves basic questions of appellate jurisdiction of which the Tenth Circuit is in conflict with the decisions of the U. S. Supreme Court and many of the Circuits. This subject has importance to the practitioner in Federal Court and to this Court in its capacity as overseer of the administration of justice in the federal court system.

SUMMARY OF THE ARGUMENT

The argument centers on the conflict between the decision of the Tenth Circuit Court of Appeals and the decisions of this Court and several other Courts of Appeals. Several decisions of this Court have held that a premature notice of appeal is effective to transfer jurisdiction to the Circuit Court, a holding complied with by virtually every Circuit Court except the Tenth, which held to the contrary in this case. The decision of the Court of Appeals on this issue creates a conflict between the Circuits indicating the necessity for review and resolution by this Court.

ARGUMENT

The Tenth Circuit Court of Appeals' decision is in conflict with the most fundamental principle of modern federal procedure as articulated by this Court:

The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Conley v. Gibson, 355 U.S. 41, 48 (1957).

The full context of the rules, in their most basic and essential principles, requires that, in construing pleadings, courts disregard harmless error (Rule 61; 28 U.S.C. § 2111), "to secure the just, speedy and inexpensive determination of every action" (Rule 1) so "as to do substantial justice." (Rule 8(f)). The decision of the Court of Appeals, resulting in the dismissal of the action on purely technical matters of pleading without reaching the substance of the petitioners' grievance, disregards the purpose of pleading as articulated by

this Court "to facilitate a proper decision on the merits." *Conley, supra*, 355 U.S. at 48.

In dismissing petitioners' appeal from the District Court's order granting summary judgment in favor of the defendants, the Court of Appeals held that the petitioners' first notice of appeal was premature and thus insufficient to bring the judgment before the Court for review. Because the petitioners failed to file a second notice of appeal, the Tenth Circuit ruled that the appeal had to be dismissed.

This holding is in conflict with *Lemke v. United States*, 346 U.S. 325, (1953); *United States v. Arizona*, 346 U.S. 907 (1953); *State Farm Mutual Automobile Insurance Co. v. Palmer*, 350 U.S. 944 (1956); *Hoiness v. United States*, 335 U.S. 297 (1948) and *United States v. Ellicott*, 223 U.S. 524 (1912), and represents a significant departure from the line of cases in the various Courts of Appeals. This conflict of decisions, and the importance of the issues of federal procedures here involved, requires this Court to exercise its supervisory powers over the administration of justice in the Federal Courts.

In *Lemka, supra*, in a per curiam decision, this Court held that a premature notice of appeal was sufficient to grant jurisdiction even though a second notice of appeal was not filed. The Court stated that the premature notice of appeal:

was however still on file on March 14th and gave full notice after that date as well as before of the sentence and judgment which the petitioner challenged. We think the irregularity is governed by Rule 52 (a) which reads *any error or defect, irregularity or variance which does not affect substantial rights shall be disregarded.*

346 U.S. at 325. (Emphasis added.)

In *United States v. Arizona, supra*, this Court granted certiorari and reversed, per curiam, a dismissal of an appeal. The appeal was dismissed because the first notice of appeal was premature and no second notice of appeal was ever filed. The same situation exists in the present case.

In *United States v. Ellicott*, 223 U.S. 524, 538 (1912), this Court held that a notice of appeal referring to "the judgment rendered in the above entitled cause on the fourth day of January, 1909," which was the date of the order denying a motion for a new trial, was sufficient to raise on appeal the final judgment which had been entered May 18, 1908.

In *Hoiness v. United States*, 335 U.S. 297 (1948), this Court reversed a dismissal of appeal below which was based on a claimed deficiency in the notice of appeal. The only appealable order was the judgment of dismissal; the later order — the one specified in the notice of appeal — was not appealable. This Court held that the "defect was of such a technical nature that the Court of Appeals should have disregarded it in accordance with the policy expressed by Congress in R. S. § 954, 28 U.S.C. (1946 ed.) § 777." *Id.* at 300.*

*The repeal of section 777 does not affect the applicability of *Hoiness* to the instant case. The legislative history of the repealing Act expressly states that the reason for the repeal was that the subject matter of section 777 was "covered by Rules 1, 15 and 61 of the Federal Rules of Civil Procedure." H. Rep. No. 308, 8th Cong., 1st Sess., p. A 239. After referring to the repeal in *Hoiness*, this Court said: "And see Rules 1, 15, 61 and 81. . . ." 335 U.S. at 300-01, n. 6. *See also* 28 U.S.C.A.,

This holding is consistent with *State Farm Mutual Automobile Insurance Co. v. Palmer, supra*, where this Court granted certiorari and reversed, per curiam, the dismissal of an appeal below which was grounded on a faulty notice of appeal.

The Tenth Circuit's decision is also in conflict with decisions in almost every other federal judicial circuit and, indeed, with decisions in the Tenth Circuit as well. In each of these cases, a premature notice of appeal was held sufficient to grant jurisdiction to the Circuit Court even though no second notice of appeal was ever filed.

In *Firchau v. Diamond National Corp.*, 345 F. 2d 269 (9th Cir. 1965), the Court relied upon *Lemke, supra*, to take jurisdiction of an Appeal filed on July 21, 1964, after a June 25th dismissal of the Complaint, but before the July 24th final order dismissing the cause of action. The Court assumed that no special circumstances existed which would make the June 25th dismissal of the Complaint final. In analyzing *Lemke, supra*, the Ninth Circuit Court noted that in the *Lemke* decision, the Supreme Court relied on Rule 52(a) of the Federal Rules of Criminal Procedure and then held:

Since a substantially similar provision is contained in Rule 61, Federal Rules of Civil Procedure, we thank the rationale of *Lemke*, supports our view as expressed above.

Rule 61, Notes of Advisory Committee on Rules. Furthermore, 28 U.S.C. § 2111, in language similar to that of Rule 61, directs appellate courts to "give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

This view was previously stated:

In this spirit, we regard the notice of appeal here in question as directed to the final judgment of dismissal, overlooking as a technical defect not affecting substantial rights, the premature filing of that notice.

345 F. 2d at 271. (Emphasis added.)

See also *Maddox v. Black Raber-Kief & Associates*, 303 F. 2d 910 (9th Cir. 1962); *Song Jook Suh v. Rosenberg*, 437 F. 2d 1098 (9th Cir. 1971); *Williams v. Town of Okoboji*, 599 F. 2d 238 (8th Cir. 1979); *Markham v. Holt*, 369 F. 2d 940 (5th Cir. 1966); *Ruby v. Secretary of the United States Navy*, 365 F. 2d 385 (9th Cir. 1966); *Keohane v. Swarko, Inc.*, 320 F. 2d 429 (6th Cir. 1963); and *Morris v. UHL & Lopez Engineers, Inc.*, 442 F. 2d 1247 (10th Cir. 1971), all holding that a premature notice of appeal was sufficient to grant jurisdiction to the Circuit Court.

In other cases, Courts of Appeals have taken jurisdiction of appeals where no formal notice was filed as required by the Rules. In *Crump v. Hill*, 104 F. 2d 36 (5th Cir. 1939), the appellant filed appellee's acknowledgement of service of notice of appeal, her entry of appearance, and the designation of the record on appeal, but failed to file a timely notice of appeal. Appellee accordingly moved to dismiss the appeal. In denying the motion, the court held that appellant's actions were in complete accordance with the spirit of the rules and in substantial compliance with their letter. Chief Judge Hutcheson further stated:

[I]t would we think be a harking back to the formalistic rigorism on an earlier and outmoded time,

as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule [73] is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights. . . . Indeed, it would we think be an exhibition of unsound reasoning and a clear abuse of judicial discretion for us to start the Rule off barnacled with the rigid and rigorous holding appellee's motion seeks.

104 F 2d at 38.

See also *Jordan v. United States District Court*, 233 F. 2d 362, 365 (D.C. Cir. 1956), where a petition for a writ of mandamus filed with the appellate court was accepted as a sufficient notice of appeal, and *Blunt v. United States*, 244 F. 2d 355, 359 (D.C. Cir. 1957), where an application made in the appellate court for leave to appeal in forma pauperis was held "an unequivocal notification of intention to appeal" and sufficient to confer appellate jurisdiction. See also *Burdix v. United States*, 231 F. 2d 893 (9th Cir. 1956).

In applying these precedents to the instant case, there can be no doubt that the notice of appeal filed in this case was sufficient to transfer jurisdiction to the Circuit Court. For all intents and purposes, the July 16, 1982 Order granting summary judgment in favor of Defendants Ford Motor and Ford Credit was, in actuality, the final order disposing of the case, but for the mere technicality of entering an order dismissing Brambrough and Van Keuren, who in fact had settled and were out of the case in July, 1979. The dismissal of the case on such technical grounds would be a reversion to the formalistic and strict rigors of pleading abandoned long ago by the federal courts, and would create a travesty of justice to the Petitioners by denying them their right to trial on the merits.

Finally, the fact that the Respondents have not been misled or prejudiced by Petitioners' actions in appealing this case is important. The Respondents' have been fully aware of the subject of the appeal and the parties against whom the appeal was taken.

CONCLUSION

For the reasons stated, Petitioners respectfully request that a Writ of Certiorari be issued to the United States Court of Appeals for the Tenth Circuit, reversing the dismissal of their appeal and allowing the case to be heard on its merits.

Respectfully submitted,
SUMMERHAYS, RUNYAN
& McLELLAND

LOWELL V. SUMMERHAYS
Counsel of Record

EDWARD T. WELLS
Counsel of Record

W. ANDREW CLAWSON
Attorney for Petitioners

DESIGNATION OF CORPORATE RELATIONSHIPS

The Quality Ford Corporation filing this Petition as petitioner in this proceeding states:

This is its original Designation Of Corporate Relationships.

The Quality Ford Corporation is not owned by any parent corporation.

The Quality Ford Corporation does not have an ownership interest in any subsidiaries.

The Quality Ford Corporation does not have any affiliates.

APPENDIX A

Rule 1. *Scope of Rules*

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 8 (f). *Construction of Pleadings*

All pleadings shall be so construed as to do substantial justice.

Rule 61. *Harmless Error*

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

2a

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 82-1788

QUALITY FORD, INC., a Utah Corporation,
Plaintiff-Appellant,

THOMAS REDD and VIOLET REDD,
Plaintiffs,

v.

FORD MOTOR COMPANY and
FORD MOTOR CREDIT COMPANY,
Delaware Corporations,

and RUSSELL BRAMBROUGH and
DANNY VAN KEUREN,
Defendants-Appellees.

Appeal from the United States District Court
For the District of Utah
(D.C. No. C-78-0348W)

Submitted on the briefs pursuant to Tenth Circuit
Rule 9:

Lowell V. Summerhays of Summerhays, Runyan &
McLelland, Salt Lake City, Utah, for Plaintiff-
Appellant.

R. Brent Stephens of Snow, Christensen & Martineau, Salt Lake City, Utah, for Defendants-Appellees Ford Motor Company and Ford Motor Credit Company.

Before SETH. Chief Judge, McKAY and LOGAN, Circuit Judges.

PER CURIAM

This three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

When this cause was docketed, the parties were advised the court was considering summary dismissal of the appeal for lack of a final order adjudicating all the claims of all the parties. No judgment was entered by the district court pursuant to Fed. R. Civ. P. 54(b).

In response plaintiff moved the federal district court for an order dismissing, with prejudice, the action as to the named defendants who had not been specifically dismissed in the judgment appealed. The court granted the motion on September 1, 1982, thereby resolving the claims by plaintiff against all parties. The September 1 order thus became the final order in the lower court's case. No second notice of appeal was filed.

Appellate jurisdiction is initially determined as of the date the notice of appeal is filed, and all appellate jurisdictional prerequisites *must be satisfied as of that date* (emphasis added). *Lamp v. Andrus*, 657 F. 2d 1167 (10th Cir. 1981), citing *Century Laminating*,

Ltd. v. Montgomery, 595 F. 2d 563 (10th Cir.), *cert. dismissed*, 444 U.S. 987 (1979). Because of the lack of a Rule 54(b) certificate, the order appealed from was nonfinal. Lamp v. Andrus, *supra*; A. O. Smith Corp. v. Sims Consolidated, Ltd., 647 F. 2d 118 (10th Cir. 1981); Golden Villa Spa, Inc. v. Health Industries, Inc., 549 F. 2d 1363 (10th Cir. 1977).

Counsel was advised of the procedural difficulty with the appeal. Filing a second notice of appeal would have corrected the problem. This was not done.

APPEAL DISMISSED. The mandate shall issue forthwith.

JANUARY TERM - February 10, 1983

No. 82-1788

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges, United States Court of Appeals.

QUALITY FORD, INC., a Utah Corporation,

Plaintiff-Appellant,

THOMAS REDD and VIOLET REDD,

Plaintiffs,

v.

FORD MOTOR COMPANY and

FORD MOTOR CREDIT COMPANY,
Delaware Corporations,
and RUSSELL BRAMBROUGH and
DANNY VAN KEUREN,
Defendants-Appellees.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc. The court previously dismissed the captioned appeal for lack of jurisdiction. The problem with the appeal was that two originally named defendants had not, prior to the filing of the notice of appeal, been formally dismissed from the action in the trial court. When advised of this court's intent to dismiss the appeal, appellant took the first step toward correcting the defect by filing in the district court a motion to dismiss the referenced defendants. Appellant failed to take the proper second step, however, which was to file another notice of appeal.

In its petition for rehearing, appellant complains that this court failed to specifically advise counsel to file a second notice of appeal. However, it is counsel's obligation to follow procedural requirements for perfecting an appeal to this court. Counsel was referred to this court's decision in *Lamp v. Andrus*, 657 F. 2d 1167 (10th Cir. 1981), which in turn cites *A. O. Smith Corp. v. Sims Consolidated, Ltd.*, 647 F. 2d 118 (10th Cir. 1981). A reading of these decisions should have made the requirement for filing a second notice of appeal apparent.

All may not be lost, however, as appellant may still avail itself of the remedy provided by Fed. R. Civ. P. 60. Accordingly, we decline to reconsider our earlier

dismissal of this appeal. The petition for rehearing having been denied by the panel to whom the case was submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Fed. R. App. P. 35, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Lowell V. Summerhays, Summerhays, Runyan & McLelland, Attorney for Plaintiff, 420 Continental Bank Building, Salt Lake City, Utah 84101. Telephone: (801) 355-5200.

AFFIDAVIT OF JOHN S. ADAMS
APPELLATE COURT NO. 82-1788

QUALITY FORD, INC., a Utah Corporation,
Plaintiff,

vs.

FORD MOTOR COMPANY,
a Delaware Corporation, and
FORD MOTOR COMPANY,
a Delaware Corporation,

Defendants.

Affiant John S. Adams, after being sworn and under oath, deposes and states as follows:

1. I am an attorney duly licensed to practice law in the state of Utah.
2. I represented Defendants Brambrough and Van Keuren in the above-entitled case and in a related state court action, No. 4093.

3. In the settlement of the state court action we entered into a Stipulation and Covenant not to sue which contained an agreement to dismiss the Federal Court action against Brambrough and Van Keuren.

4. In July of 1979 the state court action was settled and shortly thereafter Defendants Brambrough and Van Keuren were to be dismissed from the above-entitled case.

5. Since July of 1979 I have not taken an active participation in this case and neither have the defendants Brambrough and Van Keuren having considered the matter fully settled and compromised between the Plaintiffs and those Defendants.

6. In July of 1979 a motion and order dismissing Van Keuren and Brambrough were mailed to my office (a copy attached hereto). For some reason the motion and order were never submitted to the court for its signature, but in any case, from that date forward Brambrough and Van Keuren have had no participation in this case.

Further the Affiant saith not.

Dated this 10th day of January, 1983.

GUSTIN, ADAMS,
CASTING & LIAPIS
By: John S. Adams

Subscribed and sworn to before me this 10th day of January, 1983.

11a

By: Sharon Lynne McNeill

Notary Public

Residing at: Salt Lake City, Utah

My Commission expires: 9-15-84

Lowell V. Summerhays, Esq.

ROBINSON, GUYON,

SUMMERHAYS & BARNES

Attorneys for Plaintiffs

1220 Continental Bank Building

Salt Lake City, Utah 84101

Telephone: (801) 355-5200

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MOTION FOR AND ORDER OF
DISMISSAL WITH PREJUDICE

Civil No. C-78-0348

QUALITY FORD, INC., a Utah Corporation,
THOMAS RED Dand VIOLET REDD,
Plaintiffs,

vs.

FORD MOTOR COMPANY and
FORD MOTOR CREDIT COMPANY,
Delaware Corporations, and
RUSSELL BRAMBROUGH and
DANNY VAN KEUREN,
Defendants.

The Plaintiffs by and through counsel Lowell V. Summerhays of the firm of Robinson, Guyon, Summerhays & Barnes and the Defendants Russell Brambrough and Danny Van Keuren by and through counsel John Adams hereby move the above-entitled court for an order dismissing the Plaintiffs' complaint with prejudice as a Defendants Russell Brambrough and Danny Van Keuren for the reason that the dispute as between the parties involving these causes of action have been fully compromised and settled.

The parties move for an order reserving the Plaintiffs' rights as against the remaining Defendants.

Dated this day of July, 1979.

ROBINSON, GUYON,
SUMMERHAYS & BARNES

By: Lowell V. Summerhays
Attorney for Plaintiffs

GUSTIN, ADAMS,
KASTING & LIAPIS

By: John S. Adams
Attorney for Defendants

ORDER

Based upon the motion of the parties, the Plaintiff and Defendants Russell Brambrough and Danny Van Keuren by and through their respective counsel and good cause appearing therefor.

IT IS HEREBY ORDERED that Plaintiffs' complaint as to these two Defendants only is dismissed with prejudice reserving unto the Plaintiffs any rights which they have against the remaining Defendants.

DATED this day of July, 1979.

BY THE COURT:

U. S. District Judge

LVS:mjm

MAILING CERTIFICATE

I HEREBY CERTIFY that I mailed, postage prepaid, a true and correct copy of the foregoing MOTION FOR AND ORDER OF DISMISSAL WITH PREJUDICE to the following parties this day of July, 1979.

Harold G. Christensen
700 Continental Bank Building
Salt Lake City, Utah 84101

Stanford B. Owen
FABIAN & CLENDENIN
800 Continental Bank Building
Salt Lake City, Utah 84101

14a

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Lowell V. Summerhays, Summerhays, Runyan & McLelland, Attorney for Plaintiff, 420 Continental Bank Building, Salt Lake City, Utah 84101, Telephone: (801) 355-5200.

AFFIDAVIT OF W. ANDREW CLAWSON
APPELLATE COURT NO. 82-1788

QUALITY FORD, INC., a Utah Corporation,
Plaintiff,

vs.

FORD MOTOR COMPANY,
a Delaware Corporation, and
FORD MOTOR COMPANY,
a Delaware Corporation,
Defendants.

Affint W. Andrew Clawson, after being sworn under oath, deposes and states as follows:

1. During the relevant time period I was a law clerk for the firm of Summerhays, Runyan & McLelland.
2. The circuit court did give notice to the law firm that it was considering summary dismissal for lack of

jurisdiction of the above-entitled case and asked for briefs in response to that argument.

3. As a law clerk, I prepared a brief. I also prepared the motion and Stipulation for Dismissal of Brmbrough and Van Keuren from the federal suit.

4. I presented my work product to the attorney in charge, had him sign it, and forwarded it to the Circuit Court.

5. I made several phone calls to the clerk concerning the poster of the above-entitled Appeal but was never informed that a second Notice of Appeal was necessary. Furthermore, this office never received any such notice.

6. When the Order, signed by Judge Winder, dismissing Brambrough and Van Keuren, came from the District Court it was routed to my office. Knowing that the Appeal had already been filed, I did not show that order to any attorney in this office, and a second Notice of Appeal was not filed.

7. This office was not notified of the necessity of the second Notice of Appeal until it received the decision of this circuit on which the Appeal was dismissed. At that time it was too late to file another Notice of Appeal.

Further the Affiant saith not.

Dated this 6th day of January, 1983.

SUMMERHAYS, RUNYAN
& McLELLAND

By: W. Andrew Clawson

17a

Subscribed and sworn to before me this 6th day of
January, 1983.

By: Sharon Lynne McNeill

Notary Public

Residing at: Salt Lake City, Utah

My Commission expires: 9-15-84

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, has caused to be served three (3) copies of the within Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, upon the following counsel of record:

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Date *11/14* this *11th* day of May 1983.
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Respectfully submitted,

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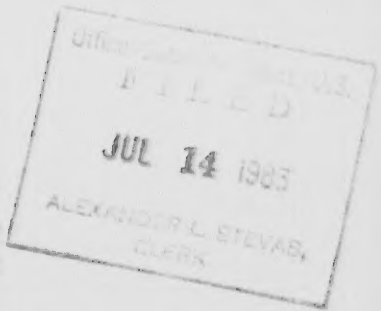
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No. 82-2064

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982



QUALITY FORD, INC., a
Utah corporation, THOMAS
REDD and VIOLET REDD,

Petitioners,

vs.

FORD MOTOR COMPANY, a
Delaware Corporation and
FORD MOTOR CREDIT COMPANY,
a Delaware corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

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APPEALS FOR THE TENTH CIRCUIT

QUESTION PRESENTED

Does a notice of appeal from a non-final order invoke the jurisdiction of the Circuit Court of Appeals when there is no appeal from the final order?

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STATUTES AND RULES INVOLVED

The statutes and rules involved in this case are 28 U.S.C. §§ 1291 and 2107, and Fed. R. App. P. 4(a), set out in full in Appendix A.

STATEMENT OF THE CASE

28 U.S.C. § 1291 provides for appeals from final orders. This provision is jurisdictional. Browder v. Director, Ill. Dept. of Corrections,

434 U.S. 257, 264 (1978). Petitioners attempted to appeal from a nonfinal order, i.e., the granting of respondents' Motion for Summary Judgment. That order dismissed only as to Ford Motor Company and Ford Motor Credit Company. It did not dismiss as to two other individual defendants, Bambrough and Van Keuren. While it is true that petitioners had, for all practical purposes, settled the case with Bambrough and Van Keuren, the trial court had never approved the settlement, had never entered an order dismissing Van Keuren or Bambrough, and had never issued an order approving the filing of an amended Complaint deleting them as defendants.

The Clerk of the Tenth Circuit Court of Appeals informed the parties

that the court was considering summary dismissal of the appeal for lack of jurisdiction because it appeared the order appealed from was nonfinal in that other defendants remained in the case. The Clerk of the Tenth Circuit Court of Appeals specifically referred petitioners to Golden Villa Spa, Inc. v. Health Industries, Inc., 549 F.2d 1363 (10th Cir. 1977), and Lamp v. Andrus, 657 F.2d 1157 (10th Cir. 1981). Lamp v. Andrus, in turn, cites A. O. Smith Corporation v. Sims Consolidated, Ltd., 647 F.2d 118 (10th Cir. 1981), wherein the Tenth Circuit Court of Appeals dismissed an appeal from a nonfinal judgment. Petitioners returned to the District Court and obtained a final order dismissing the other defendants, but did not appeal

from the final order. The Tenth Circuit then dismissed the attempted appeal of the nonfinal order for lack of jurisdiction.

In response to the Tenth Circuit's finding of lack of jurisdiction, petitioners have attempted to justify their failure to appeal the final order in this case by claiming that a law clerk working for the firm representing petitioners prepared and filed the Motion and Order dismissing other defendants which became the final order from which no appeal was taken. Petitioners further claim that after the order was signed, that fact was not brought to the attention of counsel for petitioners.

Petitioners now ask the Court, as they asked the Tenth Circuit, to ignore

the following facts: First, the Tenth Circuit noted in its Order denying the appellants' Petition for Rehearing and Suggestion for Rehearing En Banc that "A reading of these decisions should have made the requirement for filing a second notice of appeal apparent." Second, the motion seeking the dismissal of the other defendants was signed by the attorney for the petitioners. Third, the Order signed by the District Court dismissing the Complaint against the other defendants was mailed to counsel for the petitioners. Under these circumstances, Petitioners cannot claim that their failure to file a new notice of appeal from the final order is excuseable. United States v. Robinson, 361 U.S. 220 (1960).

SUMMARY OF ARGUMENT

The petitioners have failed to demonstrate a conflict between the decision of the Tenth Circuit Court of Appeals in this case and decisions of other courts of appeals in similar cases. The cases cited by the petitioners as conflicting with the holding of the Tenth Circuit Court of Appeals in this matter are not applicable to the facts of this case. To the extent there was any conflict between decisions of the courts of appeals on this issue, that conflict was resolved by this Court's holding in Griggs v. Provident Consumer Discount Company, 103 S.Ct. 400 (1982) (per curiam). There being no demonstrated conflict between the decisions of the courts of appeal, the Court should deny the Petition for

a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

ARGUMENT

PETITIONERS HAVE FAILED TO ESTABLISH THAT THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS ON THE QUESTION PRESENTED, AND TO THE EXTENT THERE WAS ANY CONFLICT, IT WAS ELIMINATED BY GRIGGS.

The authorities cited by the petitioners are not contrary to the rule applied by the Tenth Circuit Court of Appeals in dismissing the appeal below. None of the cases cited supports the proposition that a notice of appeal from a nonfinal order invokes the jur-

isdiction of the court of appeals when a final order is entered.

The petitioners claim that in several courts of appeals premature notices of appeal invoke the jurisdiction of the courts. The authorities cited by the petitioners relate to types of premature appeals not raised by the facts of this case, and fail to establish that their notice of appeal was anything other than a nullity.

The cases cited by petitioners fall into three general categories. First, the petitioners cite cases within the purview of Fed.R.App.P. 4(a)(2), i.e., notices of appeal filed after announcement of a final order, but before entry of the final order. For example, in Lemke v. United States, 346 U.S. 325 (1953) (per curiam), the petitioner's

notice of appeal was filed after sentencing, but before a formal judgment was entered. The Supreme Court reversed the Ninth Circuit's dismissal of the appeal, holding that the irregularity should be disregarded. This holding was later codified as Fed.R.App.P. 4(a)(2), which states, "Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof." See also Markham v. Holt, 369 F.2d 940 (5th Cir. 1955). In both Firchau v. Diamond National Corporation, 345 F.2d 269 (9th Cir. 1965), and Ruby v. Secretary of United States Navy, 365 F.2d 385 (9th Cir. 1966), the court of ap-

peals held that it would construe the notices of appeal of orders dismissing complaints as applying to the final orders dismissing the actions, rather than the nonappealable orders dismissing the complaints. These cases are similar to cases encompassed by the Fed.R.App.P. 4(a)(2), since the intentions of the district courts to dismiss the actions in the event amended complaints were not filed were apparent, and later ripened into final orders of dismissal. All these cases differ materially from the case at hand, in that the district courts had announced their final orders, but had not yet entered the judgments. In this case, petitioners attempted to appeal a non-final order before the final order had ever been announced.

The second category of cases cited by the petitioners deal with instances where final orders actually exist and notices of appeal have been liberally construed to apply to the existing final orders. For example, in Hoiness v. United States, 335 U.S. 297 (1948), the Supreme Court interpreted a petition for appeal as referring to a final and appealable order, even though the petition for appeal specifically referred to a subsequent, non-appealable order. Thus, in Hoiness, there was, at the time the petition for appeal was filed, a final order from which an appeal could timely have been taken. See also United States v. Arizona, 346 U.S. 907 (1953) (mem.), opinion below, 206 F.2d 159 (9th Cir. 1953); State Farm Mutual Automobile Insurance Co. v.

Palmer, 350 U.S. 944 (1956) (mem.),
opinion below, 225 F.2d 876 (9th Cir.
1955); United States v. Ellicott, 223
U.S. 524 (1912); Maddox v. Black,
Raber-Kief & Assoc., 303 F.2d 910 (9th
Cir. 1962); Crump v. Hill, 104 F.2d 36
(5th Cir. 1939); Jordan v. United
States District Court for the District
of Columbia, 233 F.2d 362 (D.C. Cir.
1956); Blunt v. United States, 244 F.2d
355 (D.C. Cir. 1957); and Burdix v.
United States, 231 F.2d 893 (9th Cir.
1956), cert. denied, 351 U.S. 975
(1956). In the foregoing cases, each
appellate court liberally construed a
notice of appeal as encompassing an
existing final order other than that
specifically mentioned in the notice,
or construed an inartfully captioned
document as a notice of appeal. In any

event, in each of the foregoing cases, contrary to this case, there was a final and appealable judgment.

Finally, the petitioners cite a group of cases which have been overruled by Fed.R.App.P. 4(a) and the Court's ruling in Griggs v. Provident Consumer Discount Company, 103 Sup.Ct. 400 (1982) (per curiam). These cases hold that a notice of appeal filed after judgment, but prior to disposition of post-trial motions, effectively appeals the final judgment. See Song Jook Suh v. Rosenberg, 437 F.2d 1098 (9th Cir. 1971); Williams v. Town of Okoboji, 599 F.2d 238 (8th Cir 1979); and Keohane v. Swarco, Inc., 320 F.2d 429 (6th Cir. 1963). In Griggs v. Provident Consumer Discount Company, supra, this Court held that a notice of

appeal filed after judgment, but prior to a disposition of a post-trial motion to alter or amend the judgment, was a nullity. Since the holdings in the cases cited by petitioners have been overruled by Fed.R.App.P. 4(a) and Griggs v. Provident Consumer Discount Company, supra, there no longer can be a conflict between those decisions and the decision of the Tenth Circuit Court of Appeals in this case.

CONCLUSION

The petitioners have sought to establish a conflict of authority between the circuit courts of appeal, but have failed to evidence such conflict.

The claimed conflict among decisions of the various circuit courts of

appeal relied upon by the petitioners is non-existent when the facts of the cases are examined. Each "premature" notice of appeal in these cases differs materially from the petitioners' situation. In the instant case, the petitioners attempted to appeal from a non-final order. When informed of the jurisdictional problem, the petitioners procured a final order, then failed to appeal from it. There are no special circumstances justifying a result different from the Tenth Circuit's holding, and no cases have been cited by petitioners in which other courts of appeal have held differently on the same facts. Further, to the extent a conflict did exist, it has been eliminated by Griggs.

For the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals.

Respectfully submitted,

SNOW, CHRISTENSEN & MARTINEAU

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APPENDIX A

28 U.S.C. § 2107. Time for appeal to court of appeals.

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after

the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11.

28 U.S.C. § 1291. Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for

the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

RULE 4, Fed. R. App. P. Appeal as of Right -- When Taken.

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of

appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a deci-

sion or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the

motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed

time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

APPENDIX B

RULE 28 LISTING OF
CORPORATE AFFILIATIONS

Respondent Ford Motor Company is the parent company.

Respondent Ford Motor Credit Company is a wholly owned subsidiary of Ford Motor Company.

The following are non-wholly-owned subsidiaries and affiliates of Ford Motor Company in the United States:

Eveleth Taconite Company
Renaissance Center Partnership
Fairlane Town Center (a partnership)

Ford Motor Company has other consolidated and unconsolidated subsidiaries which are located in the United States and in foreign countries, the majority of which have the Ford name incorporated therein or do not involve private financial interests.